

HON. JUDGE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASTE ACTION PROJECT,)	
)	No. 2:21-cv-00827-BJR
Plaintiff,)	
v.)	CONSENT DECREE
)	AND ORDER OF DISMISSAL
PLY GEM PACIFIC WINDOWS)	
CORPORATION,)	
)	
Defendant.)	
)	

I. STIPULATIONS

Plaintiff Waste Action Project (“WAP”) sent a sixty-day notice of intent to sue letter to Defendant Ply Gem Pacific Windows Corporation (“Ply Gem”) on or about April 12, 2021, and filed a complaint on June 21, 2021, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, relating to discharges of stormwater from Ply Gem’s facility in Auburn, Washington and seeking declaratory and injunctive relief, civil penalties, and attorneys’ fees and costs. Ply Gem responded to and denied certain allegations in WAP’s letter.

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SMITH & LOWNEY, PLLC
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SEATTLE, WASHINGTON 98112
(206) 860-2883

WAP and Ply Gem agree that settlement of these matters is in the best interest of the parties and the public, and that entry of this Consent Decree is the most appropriate means of resolving this action.

WAP and Ply Gem stipulate to the entry of this Consent Decree without trial, adjudication, or admission of any issues of fact or law regarding WAP's claims or allegations set forth in its complaint and its sixty-day notice.

DATED this 18th day of April, 2022.

WILLIAMS, KASTNER & GIBBS PLLC

SMITH & LOWNEY, PLLC

By _____
Mark M. Myers, WSBA #15362
Bridget T. Schuster, WSBA #41081
Attorneys for Defendant
Ply Gem Pacific Windows Corporation

By _____
Richard A. Smith, WSBA #21788
Alyssa Koepfgen, WSBA #46773
Savannah Rose, WSBA #57062
Attorneys for Plaintiff
Waste Action Project

PLY GEM PACIFIC WINDOWS CORPORATION

WASTE ACTION PROJECT

By _____
Todd D. Harbour
Vice President, Environmental Affairs
Cornerstone Building Brands, Inc.

By _____
Greg Wingard
Executive Director of Waste Action Project

II. ORDER AND DECREE

THIS MATTER came before the Court upon the Parties' Joint Motion for Entry of Consent Decree and the foregoing Stipulations of the parties. Having considered the Stipulations and the promises set forth below, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

1. This Court has jurisdiction over the parties and subject matter of this action.

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2. Each signatory for the parties certifies for that party that he or she is authorized to enter into the agreement set forth herein.

3. This Consent Decree applies to and binds the parties and their successors and assigns.

4. This Consent Decree and any injunctive relief ordered within applies to the operation, oversight, or both by Ply Gem of its facility at or about 5001 D St NW, Auburn, WA 98001 (the "Facility"), which is subject to National Pollutant Discharge Elimination System Permit No. WAR306973 (the "NPDES permit").

5. This Consent Decree is a full and complete settlement and release of all the claims in the complaint and the sixty-day notice and all other claims known or unknown existing as of the date of entry of the Consent Decree that could be asserted under the Clean Water Act, 33 U.S.C. §§ 1251-1387, arising from operation of the Facility. These claims are released and dismissed with prejudice. Enforcement of this Consent Decree is WAP's exclusive remedy for any violation of its terms.

6. This Consent Decree is a settlement of disputed facts and law. It is not an admission or adjudication regarding any allegations by WAP in this case or of any fact or conclusion of law related to those allegations, nor evidence of any wrongdoing or misconduct on the part of Ply Gem.

7. Ply Gem agrees to the following terms and conditions in full and complete satisfaction of all the claims covered by this decree:

a. Ply Gem will comply fully with all conditions of the NPDES permit and any successor, modified, or replacement permit authorizing discharges of stormwater associated with industrial activity from the Facility.

1 b. For a period of two (2) years after the entry of this Consent Decree, Ply Gem
2 will, on a quarterly basis, electronically forward to WAP copies of all communications to
3 and/or from Ecology related to its NPDES permit or stormwater discharges from the
4 Facility.

5 c. Ply Gem will conduct Stormwater Pollution Prevention Plan (“SWPPP”) training for all facility staff within sixty (60) days of entry of this Consent Decree and
6 annually thereafter.

7 d. Ply Gem will update the SWPPP to include the training plan, as required by
8 Condition S3.B.4.b.i.5 of the Industrial Stormwater General Permit (“ISGP”), within sixty
9 (60) days of entry of this Consent Decree.

10 e. Ply Gem will modify sections 3.1.2 and 3.1.3 of the SWPPP to include
11 applicable preventative maintenance/housekeeping BMPs identified at SWMMWW Vol.
12 IV-1, S454, within sixty (60) days of entry of this Consent Decree.

13 f. Ply Gem will modify the SWPPP sampling plan to include an explanation of
14 why each discharge point is not sampled, as required by Condition S3.B.5.b of the ISGP,
15 within sixty (60) days of entry of this Consent Decree.

16 g. Ply Gem will update the SWPPP site map to include a scale, identification
17 of the size of the property in acres, locations of all stormwater conveyances and the
18 delineation of the site’s drainage basins, as required by S3.B.1 of the ISGP, within sixty
19 (60) days of entry of this Consent Decree.

20 h. Ply Gem will implement, maintain, and add to the SWPPP the following
21 BMPs for two (2) years following entry of the Consent Decree:
22

1 i. Use hand sweeping or alternative cleaning methods to remove
2 sediment that accumulates in hard to access areas as needed but no less frequently
3 than once per week;

4 ii. Identify and control all on-site sources of dust, including the PVC
5 powder at the railroad spur, to minimize stormwater contamination from the
6 deposition of dust on areas exposed to precipitation, as required by Condition
7 S3.B.4.b.i.2.b of the ISGP,; and

8 iii. Enhanced BMPs at the railroad spur to eliminate PVC powder,
9 including extending the soft berm around the railcar unloading area, vacuuming up
10 loose powder as soon as it becomes visible, deploying filter socks in strategic
11 pathways of stormwater discharge, and placing catch pans beneath the hose
12 connections at the rail cars.

13 i. Ply Gem will continue to sample stormwater discharge at all outfall sample
14 points, which include SP#1 (overflow pipe from NW swale into NW retention pond), SP#3
15 (manhole just east of the east retention pond when the pond capacity to store stormwater is
16 exceeded), and SP#4 (west fire lane low point), in accordance with the ISGP, and resume
17 sampling SP#2 (rail spur flow into wetland), unless or until Ecology makes a determination
18 otherwise. Should Ecology determine that Ply Gem can eliminate certain sampling points,
19 Ply Gem will update its discharge monitoring reports accordingly.

20 8. Within thirty (30) days of entry of this Consent Decree, Ply Gem will pay \$50,000
21 (FIFTY THOUSAND DOLLARS) to Green River College Foundation for projects to address
22 impairments to, and contribute to the improvement of, the water and/or sediment quality of Mill
23

1 Creek and/or the Green River, as described in Exhibit 1 to this Consent Decree. The check will be
2 made to the order of Green River College Foundation and delivered to:

3 Green River College Foundation
4 12401 SE 320th Street
5 Auburn, WA 98092-3622

6 Payment will include the following reference in a cover letter or on the check: "Consent
7 Decree, Waste Action Project v. Ply Gem Pacific Windows Corporation, W.D. Wash. No. 2:21-cv-
8 00827-BJR." A copy of the checks and cover letters, if any, will be sent simultaneously to WAP
9 and its counsel.

10 9. Within thirty (30) days of entry of this Consent Decree by the Court, Ply Gem
11 will pay \$25,000 (TWENTY-FIVE THOUSAND DOLLARS) for settlement of WAP's
12 litigation fees, expenses, and costs (including reasonable attorney and expert witness fees) by
13 check payable and mailed to Smith & Lowney, PLLC, 2317 East John St., Seattle, WA 98112,
14 attn: Richard Smith. Ply Gem's payment will be in full and complete satisfaction of any claims
15 WAP has or may have, either legal or equitable, and of any kind or nature whatsoever, for fees,
16 expenses, and costs incurred in the Litigation.

17 10. A force majeure event is any event outside the reasonable control of Ply Gem
18 that causes a delay in performing tasks required by this Consent Decree that cannot be cured by
19 due diligence. Delay in performance of a task required by this decree caused by a force majeure
20 event is not a failure to comply with the terms of this Consent Decree, provided that Ply Gem
21 timely notifies WAP of the event; the steps that Ply Gem will take to perform the task; the
22 projected time that will be needed to complete the task; and the measures that have been taken

1 or will be taken to prevent or minimize any impacts to stormwater quality resulting from delay
2 in completing the task.

3 11. Ply Gem will notify WAP of the occurrence of a force majeure event as soon as
4 reasonably possible but, in any case, no later than fifteen (15) days after Ply Gem becomes aware
5 of the event. In such event, the time for performance of the task will be extended for a reasonable
6 period of time following the force majeure event.

7 By way of example and not limitation, force majeure events include

- 8 a. Acts of God, war, insurrection, or civil disturbance;
- 9 b. Earthquakes, landslides, fire, floods;
- 10 c. Actions or inactions of third parties over which defendant has no control;
- 11 d. Unusually adverse weather conditions;
- 12 e. Restraint by court order or order of public authority;
- 13 f. Strikes;
- 14 g. Any permit or other approval sought by Ply Gem from a government
15 authority to implement any of the actions required by this Consent Decree
16 where such approval is not granted or is delayed, and where Ply Gem has
17 timely and in good faith sought the permit or approval; and
- 18 h. Litigation, arbitration, or mediation that causes delay.

19 12. This Court retains jurisdiction over this matter while this Consent Decree remains
20 in force. And, while this Consent Decree remains in force, this case may be reopened without filing
21 fee so that the parties may apply to the Court for any further order that may be necessary to enforce
22 compliance with this Consent Decree or to resolve any dispute regarding the terms or conditions of

1 this Consent Decree. In the event of a dispute regarding implementation of, or compliance with,
 2 this Consent Decree, the parties must first attempt to resolve the dispute by meeting to discuss the
 3 dispute and any suggested measures for resolving the dispute. Such a meeting should be held as
 4 soon as practical but must be held within thirty (30) days after notice of a request for such a meeting
 5 to the other party and its counsel of record. If no resolution is reached at that meeting or within
 6 thirty (30) days of the Notice, either party may file a motion with this Court to resolve the dispute.
 7 The provisions of section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), regarding awards of
 8 costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or
 9 substantially prevailing party, will apply to any proceedings seeking to enforce the terms and
 10 conditions of this Consent Decree.

11 13. The parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), no consent judgment
 12 can be entered in a Clean Water Act suit in which the United States is not a party prior to forty-five
 13 (45) days following the receipt of a copy of the proposed consent judgment by the U.S. Attorney
 14 General and the Administrator of the U.S. EPA. Therefore, upon the filing of this Consent Decree
 15 by the parties, WAP will serve copies of it upon the Administrator of the U.S. EPA and the Attorney
 16 General.

17 14. This Consent Decree will take effect upon entry by this Court. It terminates two (2)
 18 years after that date.

19 15. Both parties have participated in drafting this Consent Decree.

20 16. This Consent Decree constitutes the entire agreement between the parties. There are
 21 no other or further agreements, either written or verbal. This Consent Decree may be modified only
 22 upon a writing signed by both parties and the approval of the Court.

1 17. If for any reason the Court should decline to approve this Consent Decree in the
2 form presented, this Consent Decree is voidable at the discretion of either party. The parties agree
3 to continue negotiations in good faith to cure any objection raised by the Court to entry of this
4 Consent Decree.

5 18. Notifications required by this Consent Decree must be in writing. The sending party
6 may use any of the following methods of delivery: (1) personal delivery; (2) registered or certified
7 mail, in each case return receipt requested and postage prepaid; (3) a nationally recognized
8 overnight courier, with all fees prepaid; or (4) email. For a notice or other communication regarding
9 this Consent Decree to be valid, it must be delivered to the receiving party at the one or more
10 addresses listed below or to any other address designated by the receiving party in a notice in
11 accordance with this paragraph 18.

12 **If to WAP:**

13 Greg Wingard
14 Waste Action Project
15 P.O. Box 9281
 Covington, WA 98042
 Email: gwingard@earthlink.net

16 **And to:**

17 Richard A. Smith
18 Alyssa Koepfgen
 Savannah Rose
 Smith & Lowney, PLLC
19 2317 East John St.
 Seattle, WA 98112
20 Email: richard@smithandlowney.com, alyssa@smithandlowney.com,
 savannah@smithandlowney.com
21
22

If to Ply Gem:

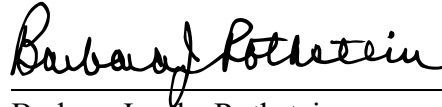
Todd D. Harbour
Cornerstone Building Brands, Inc.
5020 Weston Parkway
Cary, NC 27513
Email: todd.harbour@cornerstone-bb.com

And to:

Mark M. Myers
Bridget T. Schuster
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Email: mmyers@williamskastner.com,
bschuster@williamskastner.com

A notice or other communication regarding this Consent Decree will be effective when received unless the notice or other communication is received after 5:00 p.m. on a business day, or on a day that is not a business day, then the notice will be deemed received at 9:00 a.m. on the next business day. A notice or other communication will be deemed to have been received: (a) if it is delivered in person or sent by registered or certified mail or by nationally recognized overnight courier, upon receipt as indicated by the date on the signed receipt; or (b) if the receiving party rejects or otherwise refuses to accept it, or if it cannot be delivered because of a change in address for which no notice was given, then upon that rejection, refusal, or inability to deliver; or (c) for notice provided by e-mail, upon receipt of a response by the party providing notice or other communication regarding this Consent Decree.

DATED this 10th day of June, 2022.



Barbara Jacobs Rothstein
U.S. District Court Judge

Presented by:

WILLIAMS, KASTNER & GIBBS PLLC

SMITH & LOWNEY PLLC

By: _____
Mark M. Myers, WSBA #15362
Bridget T. Schuster, WSBA #41081
Attorneys for Defendant
Ply Gem Pacific Windows Corporation

By: _____
Richard A. Smith, WSBA #21788
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